STATE OF MICHIGAN

IN THE SUPREME COURT

BRUCE MILLAR, an Individual,	)	
	)	
Appellant,	)	
vs.	)	
	)	
	)	**COA DOCKET NO. 326544**
CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,	)	**Lapeer Circuit Court Case No. 14-047734-CZ(H)**
	)	
Appellees. /	)	

BRUCE MILLAR'S
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Submitted By:

REBECCA C. KLIPFEL (P58418)
ATTORNEY & COUNSELOR AT LAW
1221 BOWERS STREET, UNIT 2366
BIRMINGHAM, MICHIGAN 48012
PHONE/FAX: (248) 629-4502
rcklipfel@klipfel-law.net

For:
Applicant Bruce Millar

On September 15, 2016

BRUCE MILLAR'S APPLICATION FOR LEAVE TO APPEAL

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I. OVERVIEW

Few matters of current Michigan jurisprudence are more pressing than honoring and protecting a licensed building official's obligations and attempts to uncover, assess, report and rectify issues directly affecting public health and safety.[1] The lack of clarity in those protections could dissuade the most dedicated of public officials from pursuing them. Plaintiff-Applicant Bruce Millar will not be dissuaded.

In this case, the lower courts' legally unsupported and factually hackneyed findings lead to patently absurd results. These include effectively requiring an official seeking redress for retaliatory employment restrictions to divine that such restrictions are in the works, though his work record is spotless, he is still performing the restricted work activities, and no action has been taken to convey or transmit the restrictions to him. They require such an official to file a comprehensive, detailed and final complaint within 90 days of an unauthenticated employer document referencing the restrictions, though it is undisputed that no attempt had been made to transmit the restrictions to him, by mail or otherwise. It does not suffice for such an official to file suit 87 days after the first work day on which he was not assigned the restricted work duties – the same day on which he asked about the restrictions, and was handed a pre-dated letter. Similarly, summary disposition of Plaintiff-Applicant Bruce Millar's public policy claims turned not on thoughtful consideration of the pleadings and evidence in a light most favorable to him, but on apparent wholesale presumptions against

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[1] Indeed, since this action was filed, multiple state officials with similar mandates have been investigated and faced recriminations including criminal prosecutions for failure to faithfully execute their duties.

looking beyond allegations circumscribed by Michigan's Whistleblowers' Protection Act, MCL 15.361, *et seq* (WPA).

Certain of the lower courts' findings are internally impossible to square – for example, that all Defendants are "one-and-the-same for purposes of the WPA"[2] but that Millar's claims against each of them accrued at different times. Others rely on "facts" not alleged or evidenced by any Defendant, as none disputed the facts set forth in Millar pleadings, motion papers, supporting Affidavit and filed discovery responses. The courts abused their discretion in not allowing Plaintiff Millar even a first amendment to his complaint, though discovery was still open, effectively imposing a new and higher pleading standard on employee plaintiffs. The resulting Court of Appeals decision causes material injustice.

For all these reasons, Plaintiff Millar respectfully requests that this Honorable Court exercise its jurisdiction pursuant to law including MCR 7.305(B)(2), (3), (5)(a) and 5(b) and grant his application for review.

II. ORDER AT ISSUE

Plaintiff-Applicant Bruce Millar respectfully requests review of the Court of Appeals' August 4, 2016 decision affirming summary disposition of his three-count civil action in its entirety as to all Defendants pursuant to MCR 2.116(C)(7) and (C)(8), without leave to amend.[3]

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[2] *Court of Appeals Opinion dated August 4, 2016 (08/04/16 COA Order), pp. 1, 8.*

[3] In its unpublished opinion, the Court of Appeals identified the affirmed decision as "a March 19, 2015, trial court order." *08/04/16 COA Order, p. 1.* In addition to the referenced written order, the circuit court announced its ruling from the bench on March 2, 2015. *TR of 03/02/15 Hearing.* In strict accordance with MCR 7.204(A)(1)(a), Millar timely filed his Claim of Appeal of both within 21 days of the earlier date, on March 23, 2015.

Applicant Millar's June 26, 2014 Complaint alleged three counts against all Defendants: Count I, Violation Of Michigan Whistleblowers' Protect Act, MCL 15.361, *et seq.* ("WPA"); Count II, Wrongful Termination; and Count III, Civil Conspiracy. *06/26/14 Complaint.* Millar had been employed as a licensed building inspector for many years by Defendant Construction Code Authority ("CCA"), which describes itself as a multi-governmental inspections and development control agency serving cities, townships an villages in and around Lapeer County. Millar's duties included work in the jurisdictions of Defendants City of Imlay City and Township of Elba. No Defendant disputed and the Court of Appeals found that all Defendants overlapped and intersected to the extent that each was liable for the others' actions. *08/04/16 COA Opinion, pp. 1, 5 and 8.*

As detailed in his Complaint, Millar's tenure with Defendants involved multiple situations in which he was asked or expected to compromise his professional standards and overlook others' violations of their own civic, safety and professional obligations. Millar would not collude in favoritism and cronyism resulting in allowing some building owners and developers to skirt and violate the rules applicable to everyone else. Millar refused to overlook building violations and safety issues. Millar made his objections clear in verbal and written complaints within and without Defendant jurisdictions and the CCA. Millar indicated that he would continue trying to bring Defendants' conduct into line, and also to light. Millar wrote and enforced violations before hearing officers and courts, complained to city, township, county and state boards and officials, attended public meetings and complained to state agencies including the Department of Environmental Quality ("DEQ"). Millar fleshed

out his claims in abundant discovery responses which he filed with the trial court on January 26, 2015 pursuant to MCR 2.312(F).

As detailed in the February 12, 2015 Affidavit Of Bruce Millar In Opposition To Imlay City's Motion To Dismiss And Elba Township's Motion For Summary Disposition *(02/12/15 Millar AFF)*, and not disputed by any party, Millar worked many times in the jurisdictions of Defendants Imlay City and/or Elba Township, through and including working in Imlay City on March 27, 2014. On March 31, 2014, his next CCA work day, Millar asked why he was not being sent to complete his work at Imlay City. Only then was he informed, by hand delivery of CCA's letter, that he would be restricted from working within the jurisdictions of Defendants Imlay City and Elba Township.[4] Millar later obtained copies of letters to CCA about the restrictions from Imlay City (bearing the date March 20, 2014) and from Elba Township (bearing the date March 11, 2014). *Complaint, ¶¶ 27-29, and EXS. C and D.*

After some discovery, each Defendant filed its own motion for summary disposition. Each argued that Millar's exclusive remedy was provided by the WPA. Each argued that Millar's claims against it began to accrue on the date on the face of its letter about the work restrictions and that Millar failed to file suit within the WPA's 90-day limitation period. *MCR 15.363(1).* None alleged, much less evidenced, that Millar's duties were restricted in any way or that any letter or other communication regarding restricted work duties was mailed,

[4] Out of an abundance of caution, in his Complaint, Millar alleged that these events occurred on March 28 or 31, 2014 (*Complaint, ¶27*). Millar later had time to check inspection records and his calendar and to speak to others. Millar confirmed (and no party disputes) that these events occurred on March 31, 2014, his first work day not assigned to Defendant jurisdictions. *02/12/15 Millar AFF.*

emailed, faxed, given to a courier, hand-delivered, telephoned, or otherwise transmitted to him prior to March 31, 2016 – 87 days prior to his filing suit. None disputed that Millar had worked in Defendant jurisdictions many times after the dates on their letters, including through March 27, 2014 in Imlay City. Nonetheless, the circuit court ruled and the appellate panel affirmed summary disposition of Millar's Complaint in its entirety, without leave to amend.

In affirming summary disposition of Millar's WPA count as time-barred, the Court of Appeals relied on a single decision of this Court, *Joliet v Pitoniak, 475 Mich 30 (2006).* *Joliet* involved not the WPA, but the three-year limitation period for filing suit for constructive termination under Michigan's Elliot-Larsen Civil Rights Act (MCRA), MCL 37.2101, *et seq*, MCL 600.5805 and 600.5827. Citing unestablished "facts" about when certain letters were "drafted," "written" or "sent," and disregarding entirely more apposite and recent decisions of this Court, the court found that each Defendant's last discriminatory act occurred on the date on the face of its letter. The court cited *Joliet* for the principle that "for purposes of the limitations period, accrual is measured by 'the time the wrong upon which the claim is based *was done* regardless of the time when damage results.'"[5] *08/04/16 COA Order, p 5, quoting Joliet, 475 Mich 30, 36.* The court did not explain in what way Defendants' first attempt to convey to plaintiff and to effectuate the subject work restrictions was not a wrong *done* by the *employer*.

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[5] The Court of Appeals went on to misquote *Joliet* as stating that " 'it is the *employee's* wrongful act that starts the period of limitations . . . .' " *08/04/16 COA Opinion, p 5, citing Joliet, 475 Mich 30, 41.*

The lower courts' "analyses" of Millar's public policy count were similarly flawed. The Court of Appeals cited a single case, *Dudewicz v Norris Schmid, Inc, 443 Mich 68 (1993), overruled in part on other grounds, Brown v Mayor of Detroit, 478 Mich 585, 595, n 2 (2007).* The Court of Appeals reduced Millar's Complaint – filed 87 days after the first transmission to him of the subject work restrictions – as arising from "reporting various code violations," and nothing else. *08/04/16 COA Opinion, p 7.* The lower courts again simply disregarded abundant recent decisions, including by this Court, warranting different results.

Citing no factor in support, because only Defendants delayed the proceedings with incessant requests for extensions of time, refusal to provide discovery and meritless discovery motions, the courts summarily refused to permit even a first amendment to Millar's Complaint.

The lower courts failed and refused to address the myriad of appellate decisions on these issues. These include major decisions announced by this Court since Millar's suit was filed.[6] Plaintiff Millar appreciates the difficulties of negotiating recent developments in the law, particularly relative to the WPA. But he is a building inspector. He looks to this Court

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[6] See, *e.g., Wurtz v Beecher Metro Dist, 495 Mich 242 (April 25, 2014) (distinguishing WPA from CRA "adverse employment actions" in holding that WPA protections did not apply to job applicants and prospective employees); Whitman v City of Burton, 497 Mich 896 (November 19, 2014) (vacating and remanding Court of Appeals decision for consideration in light of Wurtz), Landin v Healthsource Saginaw (MSC No. 149663)(November 13, 2015 Order withdrawing leave to appeal Court of Appeals decision that plaintiff alleged conduct not circumscribed or preempted by the WPA); Pace v Edel-Harrelson , *** Mich *** (February 1, 2016) (remanding for further consideration of employee's public policy count, which Court of Appeals had found to be preempted by the WPA); and Smith v City of Flint (MSC No. 152844) (June 10, 2016 Order for supplemental briefs and mini-oral argument on issues including whether the Court of Appeals erred in applying a COA MCRA case to plaintiff's WPA claim).*

to redress the devastating effects of requiring him, but not the courts below, to speedily, accurately, comprehensively and precisely interpret and apply the letter of the law.

III. QUESTIONS PRESENTED

A. WHEN DID MILLAR'S WPA CLAIM ACCRUE?

Plaintiff-Applicant Millar answers:	**March 31, 2014.**
Defendant CCA answers:	**March 27, 2014**
Defendant Imlay City answers:	**March 20, 2014**
Defendant Elba Township answers:	**March 11, 2014**
Court of Appeals answered:	**March 27, 20 and 11, 2014.**

1. **DID THE LOWER COURTS ERR IN RELYING ENTIRELY ON AN MCRA CONSTRUCTIVE TERMINATION CASE, *JOLIET v PITONIAK*, IN FINDING THAT MILLAR'S WPA CLAIM WAS TIME BARRED?**

2. **DOES AND SHOULD MICHIGAN JURISPRUDENCE DIRECT THAT A WPA CLAIM ACCRUES WHEN AN EMPLOYER DECIDES TO TAKE DISCRIMINATORY ACTION, BUT HAS NEITHER ATTEMPTED TO TRANSMIT THAT DECISION TO PLAINTIFF NOR STOPPED EMPLOYING PLAINTIFF IN A MANNER DIRECTLY CONTRADICATORY TO THAT DECISION?**

3. **WHERE DEFENDANTS ARE FOUND TO BE "ONE-IN-THE-SAME FOR PURPOSES OF THE WPA," CAN PLAINTIFF'S CLAIMS AGAINST THEM HAVE ACCRUED ON DIFFERENT DATES?**

B. IS MILLAR'S PUBLIC POLICY COUNT PREEMPTED AS A MATTER OF LAW BY HIS WPA COUNT?

C. DID THE LOWER COURTS ERR IN REFUSING TO PERMIT EVEN A FIRST AMENDMENT TO MILLAR'S COMPLAINT WHEN ALL PERTINENT FACTORS SUPPORTED PERMITTING AN AMENDMENT?

IV. STATEMENT OF UNDISPUTED FACTS

Plaintiff-Applicant Millar relies pursuant to MCR 2.116(C)(7) and (C)(8) on the facts alleged in the Complaint and, relative to MCR 2.116(C)(7), established by unchallenged

evidence including the February 12, 2015 *Affidavit Of Bruce Millar In Opposition To Imlay City's Motion To Dismiss And Elba Township's Motion For Summary Disposition (02/12/15 Millar AFF).* No Defendant submitted a countering affidavit or other evidence. Indeed, none challenged the facts as alleged and evidenced by Millar.

It is accordingly uncontrovertible that:

Plaintiff-Applicant Bruce Millar worked for over a dozen years for Defendant CCA, beginning in 2002. Millar was employed full time and at will as a Michigan licensed Plumbing Inspector & Plan Reviewer, Mechanical Inspector & Plan Reviewer and Fire Inspector. *Complaint, ¶¶8-9 and EXHIBITS A and B.* Millar's compensation was directly related to his workload. *Complaint, ¶¶9-10.* As a regular part of his CCA employment, Millar conducted residential and commercial inspections in the jurisdictions of Defendants Imlay City and Elba Township. *Complaint, ¶¶12, 30.*

Defendant CCA describes itself as "a multi-governmental inspections and development control authority" providing services to active municipal clients, including Defendants Imlay City and Elba Township. Defendant CCA's various organizational documents reflect that its Code Official reports to the Board of Directors, which in return reports to the active client municipalities. *Complaint, ¶23 and EXHIBIT B.* As further alleged in the Complaint and borne out in discovery filed in the trial court, Defendants Imlay City and Elba Township overlap considerably with and exert high degrees of control over Defendant CCA. *Complaint, ¶¶2, 24, 28 and 34 and EXHIBITS B, C and D.* For example, each participates in electing Defendant CCA's Board. Each identifies itself to the state of Michigan as its own "enforcing agency" relative to building and related codes, then

designates Defendant CCA to provide inspectors/enforcement officers authorized to take actions including issuing appearance tickets. *Defendant City Of Imlay City's Responses To Millar's First Discovery Requests To Imlay City: 1. Requests To Admit (IC's 11/19/14 Admissions), ¶¶1-4; and Defendant Elba Township's Responses To Millar's First Discovery Requests, Requests To Admit (ET's 11/19/14 Admissions), ¶¶1-6.*[7] Defendant Elba Township Supervisor Michael Boskee was at all relevant times a Trustee of Defendant CCA's Board. *ET's 11/19/14 Admissions, ¶3.* One of Defendant CCA's two offices is actually located at 50 North Main Street, Imlay City, which is also Defendant Imlay City's main address and City Hall. *IC's 11/19/14 Admissions, ¶5.*

Plaintiff Millar's inspections and other work often involved matters of public interest and safety. *Complaint, ¶¶13-17.* However, Defendants engaged in continuing courses of conduct whereby they often circumvented and/or "overruled" Plaintiff Millar's counsel, findings and decisions. *Complaint, ¶¶16-17.* In good faith, Plaintiff Millar both announced his intentions to and did report instances of Defendants' wrongful conduct, from verbally notifying various local officials through formal actions like filing a complaint with Michigan's Department of Environmental Quality ("DEQ"). Multiple specific examples were detailed in the Complaint and in Plaintiff Millar's discovery requests and responses. *See, e.g., Complaint,¶¶16-17; IC's Admissions, ¶¶7-12; ET's Admissions, ¶¶7-12; Response To Construction Code Authority's Discovery Requests To Plaintiff Including Requests For Admissions And Interrogatories Dated October 28, 2014 ("Millar's Admissions"); and*

[7] Though never referenced in Defendants' motions, these responses were filed with the circuit court on November 9, 2014.

Millar's First Discovery Requests To Construction Code Authority: 1. Requests For Admission; and 2. Interrogatories and Document Requests [MCR 2.309, 2.310 and 2.312] ("Millar's 1st RFA To CCA"), ¶¶19-24.[8]

Plaintiff Millar worked through Thursday, March 27, 2014 within the jurisdiction of Defendant Imlay City, returning to the Defendant CCA's office per his usual schedule the next Monday, March 31, 2014. *02/12/15 Millar AFF.* On Monday, March 31, 2014, Millar asked an administrative employee of Defendant CCA why he was not being scheduled to follow up at that site. In response, the employee handed Millar a letter bearing the date March 27, 2014, signed by Defendant CCA's Board Chairman, with the "request that you immediately cease conducting all . . . inspections within [the] communities" of Defendants Imlay City and Elba Township, pursuant to their wishes. The Board Chairman wrote that it had been "put upon" him to effectuate this change, as Millar's direct supervisor was on vacation until April 7, 2014. The Board Chairman invited Millar to request copies of letters received by CCA from Defendants Imlay City and Elba Township from his direct supervisor upon the supervisor's return from vacation. Plaintiff Millar subsequently requested and received copies of letters to Defendant CCA dated March 11, 2014 from Defendant Elba Township and March 20, 2014 from Defendant Imlay City. *Id; and Complaint, ¶¶18-20 and EXHIBITS C and D.* As touched on above, Plaintiff Millar also requested and received a copy of his unequivocally positive CCA personnel file. *Complaint, ¶¶20-21.*

[8] Plaintiff-Applicant Millar filed these requests and responses pursuant to MCR 2.312(F) on January 26, 2015.

On June 26, 2014, the 87th day after the March 31, 2014 simultaneous and sole transmission and receipt of Defendant CCA's letter, by hand delivery, Millar filed his Complaint. The Complaint alleges: Count I, Violation Of Michigan Whistleblowers' Protect Act, MCL 15.363, *et seq.* ("WPA"); Count II, Wrongful Termination; and Count III, Civil Conspiracy. After generous extensions of time, each through its own counsel, Defendants filed Answers and Affirmative Defenses. Inexplicably, the circuit court then delayed pretrial conference scheduling while awaiting a superfluous notice of appearance from Defendant CCA'S counsel.

By the time of the November 17, 2014 pretrial hearing, all parties had engaged in written discovery and production of documents. Indeed, Defendant Elba Township had filed a motion to compel Millar's last five years of income tax returns, which was heard and of course denied immediately prior to the pretrial conference. *TR of 11/17/14 Hearing.* The circuit court issued its 11/17/14 Pretrial Conference Order and discovery continued. All parties executed and on February 18, 2015, the circuit court issued a Stipulated Protective Order Re: Confidential Tax Documentation. Preliminary witness lists were filed.

In a January 8, 2015 motion, Defendant Imlay City sought dismissal of the Complaint. Imlay City relied very heavily on the argument that Plaintiff Millar's WPA Count was time barred. Specifically, Imlay City wrote that because "the alleged wrongful action of the City of Imlay City was its letter requesting that Plaintiff no longer perform work within its jurisdiction" and that because that letter was sent to Defendant CCA on March 20, 2014, the WPA's 90-day deadline began running against it on that date. *Motion and Brief In Support Of Defendant City Of Imlay City's Motion To Dismiss ("IC's Motion"), p 6.* In a footnote,

Defendant Imlay City reiterated that the March 27, 2014 letter "was drafted and sent by the CCA, not this Defendant, which made its request on March 20, 2014." Imlay City then devoted two sentences in that footnote, only, to arguing that if the WPA Count against it accrued when Defendant CCA took action, it would fail as untimely because "[t]he period accrues at the time when the alleged wrong is committed, not when damages from the alleged wrong are suffered." *Id, p 6, n 2, citing Joliet v Pitoniak, 475 Mich 30 (2006).* Plaintiff Millar was relatively unconcerned as the June 26, 2014 Complaint specifically alleged that he received Defendant CCA's March 27, 2014 letter "no sooner than March 28, 2014, and likelier the following Monday, March 31, 2014." *Complaint, ¶27.* Moreover, after reviewing records and speaking with others, Plaintiff Millar was able to and did aver that Defendant CCA's letter was only hand delivered to him on Monday, March 31, 2014. The letter was only delivered when Plaintiff Millar inquired as to his schedule, which had included work in the jurisdiction of Defendant Imlay City through March 27, 2014. *02/12/15 Millar AFF.*

It bears repeating: no Defendant has alleged, much less evidenced, that any letter or other communication regarding restricted work duties was mailed, emailed, faxed, given to a courier, hand-delivered, telephoned, or otherwise transmitted to Millar prior to March 31, 2016. Indeed, no Defendant produced any evidence regarding the preparation, authorship, intent or effect of any letter, or anything else. None denies that Millar worked within the jurisdictions of Defendants Imlay City and/or Elba Township through March 27, 2014, or that he had no way of knowing about their collective decision until he asked about his schedule and CCA's letter was handed to him – on March 31, 2016.

Defendants Elba Township and CCA followed suit with their own dispositive motions, dated February 2 and February 9, 2015, respectively. Elba Township argued that the WPA Count against it accrued either on the March 11, 2014 date of its letter to CCA or, at the latest, "when Defendant CCA notified Plaintiff in writing on March 27, 2014" of its wishes. *Motion For Summary Disposition On Behalf Of Defendant Elba Township and Brief In Support ("ET's Motion"), pp 2, 5.* Defendant CCA embraced and ran with the notion that on its face, the WPA Count was time barred because it was filed 91 days after the March 27, 2014 date on the face of its letter notice to Plaintiff Millar. *Motion and Defendant Construction Code Authority's Brief In Support Of Motion For Summary Disposition Pursuant To MCR 2.116(C)(7) and (C)(8) ("CCA's Motion").* Again, Defendant Elba Township's reliance on its March 11, 2014 letter to Defendant CCA was nonsensical because not only had Plaintiff Millar not seen it until well after March 27, 2014, but also because he had worked several days within the jurisdiction of Elba Township in the interim period. *02/12/15 Millar AFF.* No Defendant addressed the facts establishing that Defendants Imlay City and Elba Township each overlapped with and exerted control over Defendant CCA to the extent that it shared liabilities as putative employers/alter egos. Each Defendant argued that Plaintiff Millar's myriad and diverse allegations were all encompassed within the ambit of the WPA, and preempted by it. Defendants further argued that the remaining claims in the Complaint were otherwise barred by governmental immunity.

In light of the February 23, 2015 hearing initially scheduled on the motions of Defendants Imlay City and Elba Township, Plaintiff Millar filed an initial written response to those motions on February 13, 2015. *Millar's Response In Opposition To Imlay City's*

Motion To Dismiss And Elba Township's Motion For Summary Disposition ("Millar's 02/13/15 Opposition"). When hearings on all motions were consolidated, on February 25, 2014, Millar's Response In Opposition To Construction Code Authority's Motion For Summary Disposition ("Millar's 02/25/15 Opposition") was filed. Plaintiff Millar's latter opposition both incorporated and supplemented the prior filing. *Millar's 02/25/15 Opposition, p 2, n 1.* Plaintiff Millar's February 12, 2015 Affidavit was attached to both oppositions. In addition to the facts set forth above, Plaintiff Millar averred specifically that inspection records showed that he was performing inspections within Imlay City on dates including March 10, 14, 19 and 27, 2014 and within Elba Township on dates including March 14 and 17, 2014. Plaintiff Millar further averred that on Monday March 31, 2014, he asked a CCA administrator why he was not being sent to continue the project he had worked in Imlay City on March 27, 2014. At that time, Defendant CCA's letter bearing the date March 27, 2014 was hand delivered to him. *02/12/15 Millar AFF.*

The circuit court conducted a consolidated hearing on Defendants' motions on March 2, 2015, reading a statement from the bench after hearing very brief statements from counsel. *TR of 11/17/14 Hearing.* The judge announced that Defendants-Defendants' motions were granted in their entireties. An Order Granting Defendants' Dispositive Motions "for the reasons stated on the record" was issued on March 19, 2015.

Plaintiff Millar timely filed a Notice of Appeal. After a hearing on May 11, 2016, in a written, unpublished opinion dated August 4, 2016, a panel of the Court of Appeals affirmed. This timely application ensued.

V. ARGUMENT

A. MILLAR'S WPA CLAIM ACCRUED NO SOONER THAN MARCH 31, 2014, WHEN DEFENDANTS FIRST ATTEMPTED TO COMMUNICATE TO HIM AND EFFECTUATE THE SUBJECT WORK RESTRICTIONS.

1. THE LOWER COURTS ERRED IN RELYING ENTIRELY ON AN MCRA CONSTRUCTIVE TERMINATION CASE, *JOLIET v PITONIAK*, IN FINDING THAT MILLAR'S WPA CLAIM WAS TIME BARRED.

2. MICHIGAN JURISPRUDENCE DOES AND SHOULD NOT DIRECT THAT A WPA CLAIM ACCRUES WHEN AN EMPLOYER DECIDES TO TAKE DISCRIMINATORY ACTION, BUT HAS NEITHER ATTEMPTED TO TRANSMIT THAT DECISION NOR STOPPED EMPLOYING PLAINTIFF IN A MANNER DIRECTLY CONTRADICTORY TO THAT DECISION.

In deciding that Plaintiff Millar's WPA count began to accrue against each Defendant on the date on the face of its own letter, regardless of addressee or transmission, the courts below relied entirely on a single decision of this Court, *Joliet v Pitoniak, 475 Mich 30 (2006)*. Nothing about *Joliet* permits a court to fill in for itself when a document was "drafted" and to start the clock running on an employee's case from that date. Certainly nothing about *Joliet* suggests that an employer defendant's first attempt to transmit or effectuate violative work restrictions is somehow not "an adverse employment action" taken by that employer. *08/04/16 COA Order, p. 2.* As Millar argued below, this Court in *Joliet* emphasized how that case differed from *Collins v Comerica Bank, 468 Mich 628 (2003).* In *Collins,* as here, plaintiff employee did not allege constructive discharge based on prior bad conduct by defendant employer. Rather, Collins alleged discriminatory discharge. The lower courts found that Collins' time to file began to run on the date she was suspended by her employer, which was also the last day she worked. This Court reversed, finding that the clock began to run on the later date that defendant employer actually terminated Collins. As this Court

reiterated in *Joliet,* " 'a claim for discriminatory discharge cannot arise *until* a claimant has been discharged.' " *475 Mich 30, 37, quoting Collins, 468 Mich 628 at 633, emphasis added by MSC.*

In *Collins,* this Court distinguished cases in which a plaintiff "knew on the last day they worked that their employment had been terminated," effective that day. In contrast, on Collins' last day of work, she "only knew that she had been suspended indefinitely." Thus, each plaintiff's knowledge of the employer's violative conduct was crucial to this Court's decisions. *Collins, 468 Mich 628 at 633.* The Court of Appeals has held that in a case of discreet adverse employment action, the claim accrues when the action is made and communicated to the worker. *See, e.g., Niezgoski v Quality Home Care, Inc, unpublished (COA Docket No. 250385) (January 2005) (citing Collins with approval for the statement that a terminated employee's claim accrues on receipt of notice of discharge) (copy attached as EXHIBIT B to Millar's 02/25/15 Opposition); and Delaware State College v Ricks, 449 US 250, 261 (1980).*

In the courts below, Plaintiff-Applicant Millar addressed and distinguished each "authority" cited in Defendants' motions. *Garg v Macomb County Community Mental Health Svces, 472 Mich 263 (2005),* involved a plaintiff's attempts to extend the three-year deadline for filing claims under Michigan's MCRA based on allegations of "continuing violations," the effective equivalent of Millar's arguing – which he does not – that his claims accrued anew each time Defendants did not assign or permit him to perform inspection and other services in a particular jurisdiction. Similarly, the unpublished decision in *Moyer v Comprehensive Rehabilitation Ctr, (COA Docket No. 292061) (September 2010)* turned on rejection of a

"continuing violations" argument advanced by a plaintiff who failed in any event to allege any discriminatory conduct. In *Kimmelman v. Heather Downs Mgmt Ltd,_278 Mich App 569 (2008),* there was no issue that the plaintiff filed suit well past 90 days after the date on which he was told that his employment was terminated. *Covell v Spengler, 141 Mich App 76 (1985),* concerned a WPA plaintiff who acknowledged that he failed to file within 90 days of his termination, but argued unsuccessfully that MCL 15.363(1) was "permissive" rather than mandatory. The court held that Covell failed to file suit within 90 days of being informed that he was terminated, a finding not inconsistent with Millar's position. Apparently Millar's arguments regarding all of these cases fell on deaf ears in the courts below. Neither the trial court nor the Court of Appeals acknowledged these arguments or cases.

Joliet is also inapposite to the instant case because it involved not a WPA limitation period, but the three-year period for filing an MCPA claim. In its reversed ruling, the Court of Appeals in *Joliet* relied on a WPA case involving constructive termination, *Jacobson v Parda Fed Credit Union, 457 Mich 318 (1998).* This Court wrote that to the extent *Jacobson* held that allegations of constructive discharge could operate to extend the applicable period of limitations for discriminatory acts falling outside the period, and was inconsistent with the holding in *Magee v DaimlerChrysler Corp 472 Mich 108 (2005)* to that effect, it was overruled. *Joliet, 475 Mich 30, 31.* The partial overruling of a constructive termination finding in *Jacobson* in this manner on this ground is of questionable import relative to Millar's claims.

In the decade since this Court's decision in *Joliet*, the Court has issued a number of important decisions involving the WPA. For example, in *Wurtz v Beecher Metro Dist, 495*

Mich 242 (2014), this Court held that unlike the MCRA and corresponding federal statutes, the WPA did not protect job applicants or prospective employees. The Court discussed at length the fact that many courts, including this Court, had at times grouped the retaliatory acts that an employer might take against a whistleblower under the broader term "adverse employment actions." The Court went on to explain the original development and definition of the term in the context of federal antidiscrimination statutes and how it crept into MCRA jurisprudence, then to WPA cases. The Court acknowledged that the term "adverse employment action" might be "helpful shorthand" for the different ways employers could retaliate or discriminate again employees, but that "despite courts' freewheeling transference of the term from one statute to another, the WPA actually prohibits *different* 'adverse employment actions' than the federal and state antidiscrimination statutes." *Wurtz, 495 Mich 242 (2014), n 9.*

To wit, MCL 15.363(1) provides that a person who alleges a violation of the act may bring a civil action "within 90 days after the occurrence of the alleged violation of this act." MCL 15.362 defines WPA violations expressly as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of the state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by the public body, or a court action.

Nothing in the statutory language implicates the MCRA, which provides redress for prohibited practices by an employer that are enumerated at MCL 37.2202.

Unlike the WPA, the MCRA does not set forth a limitations period. This Court has applied MCL 600.5805(10) to impose a three-year limitation on commencing an MCRA suit, as it did in *Joliet*.[9] The subsection applies to all claims for injury to persons or property not identified and given another limitations period elsewhere in the statute. It is not clear whether or how any of the limitations at MCL 600.5801, *et seq*., necessarily apply to this claim, or to any WPA claim.[10]

In *Wurtz,* this Court emphasized the text of the WPA. The Court wrote that "a plaintiff's demonstration of some 'adverse employment action' as that term has developed in other lines of caselaw will not be sufficient" to establish a violation of the WPA. Wurtz may have demonstrated an "adverse employment action" for the purposes of another cause of action, but Wurtz had not demonstrated one of the specific adverse employment actions enumerated in the WPA. *Id.*

In addition to the texts of the WPA and the MCRA, their drastically inapposite time constraints (90 days versus three years) and professed purposes weigh against treating them exactly the same under the law. An employer's withholding of information until an employee

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[9] As this Court pointed out in *Joliet*, the language formerly found at MCL 600.5805(9) is now set forth in MCL 600.5805(10). *Joliet, 475 Mich 30, 32, fn 2.*

[10] At the circuit court hearing, responding to Millar's analogizing of the WPA's 90-day period with that of the EEOC, which starts on the day of receipt of a right to sue letter, Defendant CCA's counsel objected to such a comparison because a WPA claim "is not a Title VII case . . . . plus here in Michigan, wrong is wrong when wrong happens, not when it's felt to have perceived [*sic*]." In fact, at the hearing, Millar's counsel referred to "EEOC right to sue letters." *TR of 03/02/15 Hearing, p 5, lines 6-11; and p 7, lines 4-12.* The Michigan EEOC's policy regarding the receipt of right to sue letters corresponds with that of the federal EEOC for Title VII cases; both are readily available on agency websites. In any event, Defendants cannot pick and choose to rely on state or federal civil rights cases only insofar as they support Defendants' positions.

asks for it, as Defendants did in this case, has far different implications to an individual expected to file suit within 90 days, as with Plaintiff-Applicant Millar. As argued below, the least conscientious employee can be expected to ask about work restrictions within plenty of time to prepare and file an MCRA action. The most conscientious employee, Plaintiff-Applicant Millar, asked about restrictions on the day they were effectuated, March 31, 2014. According to the Court of Appeals' "logic," an individual who does not ask his or employer regularly whether any adverse decisions are in the works risks waiving a WPA suit if the employer comes up with a written reference to the decisions bearing an earlier date.

It is also well established that unlike the MCRA, the WPA is expressly premised on the underlying purpose of protecting the public. This Court has long viewed the WPA as a remedial statute and required that it be liberally construed to favor the persons the Legislature intended to benefit. *Dolan v Continental Airlines/Continental Express, 454 Mich 373 (1997).* In striking contrast, the MCRA provides private compensation for discriminatory conduct by public and private employer defendants. This mandate is likewise important, but it is not the same as that of the WPA.

Very recently, in *Smith v City of Flint,* this Court indicated interest in these issues. Plaintiff-Applicant police officer Smith alleged violations of the WPA including changing the location of his patrol beat and interfering with his duties as a union president. The Court of Appeals published its decision that Smith failed to set forth a sufficient adverse employment action occurring within the WPA's 90-day ambit. The Court of Appeals based its findings on an appellate decision on an MCRA matter, *Pena v Ingham County Road Comm'n, 255 Mich App 299 (2003). Smith v Flint, 313 Mich App 141 (2015).* This Court ordered supplemental

briefing and a mini-hearing on issues including whether the Court of Appeals erred in applying an MCRA case (*Pena*) to Smith's WPA count. *Smith v City of Flint, MSC No. 152844, 06/10/16 Order re: 313 Mich App 141 (2015).*

Clearly, the Court of Appeals panel's affirmation of summary disposition of Millar's Complaint based on an MCRA constructive discharge case (*Joliet*) is an issue of significant public interest against a subdivision of the state involving a legal principle of major significance to the state's jurisprudence. *MCR 7.305(B)(2) and (3).* The Court of Appeals' total reliance on *Joliet*'s accrual analysis was clearly erroneous and will cause material injustice. *MCR 7.305(B)(5)(a).* Michigan jurisprudence does and should not require any employee, particularly one tasked with public health and safety, to constantly ask whether any adverse employment action is in the works. It does and should not direct that the clock begins to run on a WPA claim when an employer makes a decision to take action, and perhaps drafts a writing on the issue, but neither attempts to convey work restrictions or termination to an employee plaintiff and in fact continues tasking the employee with the restricted work.

3. WHERE DEFENDANTS ARE FOUND TO BE "ONE-AND-THE-SAME FOR PURPOSES OF THE WPA," NONE CAN RELY ON AN EARLIER ACCRUAL DATE.

The Court of Appeals found that Plaintiff-Applicant Millar established that Defendants CCA and member jurisdictions Imlay City and Elba Township overlapped and shared control to the extent that each was responsible for the others' actions relative to his claims. *08/04/16 COA Opinion, pp 1, 5 and 8.* The panel nonetheless affirmed the trial court's decisions that the clock began to run on Millar's WPA causes against Defendants Imlay City and Elba Township on the dates of their own letters to Defendant CCA, March 20

and March 11, 2014, respectively. Both courts equivocated, stating that in any event, the clock began to run relative to each Defendant no later than March 27, 2014, the date on the face of Defendant CCA's letter. *Id at p 6.* The Court of Appeals then employed these findings to rule that Defendants accordingly could not have conspired to commit any act. They were "one-in-the-same" such that Millar could not "show that there were three separate entities that conspired together to terminate him." *Id at p 6.*

In light of Defendants' unity, including responsibility for the others' actions relative to Millar, none can rely on an earlier date of accrual than any other. This is axiomatic given a finding that the three Defendants were "one-in-the-same" for the purposes of Millar's lawsuit. Millar questions the applicability of the "exclusive" statutory scheme at MCL 600.5801, *et seq.*, to his claims, given the WPA's express conflicting limitations period.[11] Plaintiff-Applicant Millar submits that Defendants cannot both rely on that scheme and deny that pursuant to MCL 600.5825, his claims against all began to run on the last effective trigger date applicable to any: March 31, 2014. This Court's review of these issues is appropriate pursuant to M CR 7.305(B)(2), (3), (5)(a) and (5)(b).

B. THE LOWER COURTS ERRED IN FINDING THAT AS A MATTER OF LAW, DUE TO THE WPA'S PREEMPTIVE EFFECTS, NO FACTUAL DEVELOPMENT IN ONGOING DISCOVERY COULD SUPPORT MILLAR'S COUNT FOR ADVERSE EMPLOYMENT ACTION IN VIOLATION OF PUBLIC POLICY.

Plaintiff-Applicant Millar's claims for adverse employment actions in violation of public policy were given only the most cursory attention in the courts below. As with the WPA accrual issues, the public policy count was summarily dismissed based on misstatement

[11] See, *e.g., Trentadue v Buckler Automatic Lawn Sprinkler Co, 479 Mich 378 (2007).*

of the "facts." The lower courts again failed to address any of the authorities cited by Applicant Millar, relying entirely on *Dudewicz, supra, 443 Mich 68 (1993), overruled in part on other grounds, Brown v Mayor of Detroit, 478 Mich 585, 595, n2 (2007).* The Court of Appeals simply concluded that the Complaint – filed 87 days after the first transmission to Millar and effectuation of the subject work restrictions – arose from Millar's "reporting various code violations," and from "reporting various code violations," alone. *08/04/16 COA Opinion, p 7.* This conclusion was clearly erroneous and results in material injustice. Because it so severely constricts a plaintiff's means of discovering, rectifying and bringing to light matters of immediate public safety and misdeeds by civic officials, the Court of Appeals' approach has major significance to the public interest and to Michigan jurisprudence. *MCR 7.305(B)(2), (3), (5)(a) and 5(b).*

Contrary to the conclusory statements of Defendants and both courts below, Millar's Complaint alleged a myriad of events and conduct potentially giving rise to liability under the WPA, in violation of public policy and/or in conspiracy. That is, this case is not like *Andalzula v Neogen Corp, 292 Mich App 626, 631 (2011)*, wherein the plaintiff filed suit two years after being terminated following her cooperation in a single inspection of the boiler on her employer's premises. Nor is it like *Dolan v Continental Airlines/Continental Express, 454 Mich 373,* a 1997 case cited by Imlay City for the proposition that "[t]he WPA provides the exclusive remedy for individuals who allege retaliation for reporting alleged violations of law and preempts all public policy claims." *IC's Motion, p 6.* The *Dolan* Court said no such thing. Plaintiff Dolan, an airline ticketing agent, was found to have stated a valid WPA claim when she was terminated after complying with DEA requests for passenger information. This

Court reversed the trial court's erroneous summary dismissal of Dolan's WPA claim, citing *Dudewicz v Norris Schmid, Inc, 192 Mich App 247, aff'd in part and rev'd in part, 443 Mich 68 (1993) (plaintiff stated WPA claim for termination following report of a single workplace assault).* *Dolan* and *Dudewicz* each stated a valid WPA claim, in direct contrast to Defendants' presumption about Plaintiff Millar. For this reason, alone, these cases provide little guidance relative to Count II.

The Court of Appeals articulated the difference in *Driver v Hanley, 226 Mich App 558 (1997),* clarifying that where WPA claims failed, public policy claims arising from the same facts were not necessarily barred. *Driver* quoted this Court's statement in *Dudewicz* that a public policy claim is sustainable "only where there is not an *applicable* statutory prohibition against discharge in retaliation for the conduct at issue." *226 Mich App 558 (emphasis added by Court of Appeals), also citing Garavalgia v Centra, Inc, 211 Mich App 625 (1995) (claim for public policy violation could be premised on alleged violation of federal statute).* Plaintiff Millar notes, as well, that in the ever changing landscape of the law on WPA claims, the Michigan Supreme Court disapproved in 2007 of even *Dudewicz*'s apparent requirement that an employee of a public body's reporting must be to an outside agency or higher authority. *Brown v Mayor of Detroit, 478 Mich 589 (2007) (also holding that WPA protection can extend to reporting outside the employee's assigned or regular job duties).*

Moreover, unlike any case cited by any Defendant, this case involves complex factual allegations involving many layered relationships, interactions, professional standards, statutes, regulations, codes, ordinances, public interests and contractual agreements (per Defendants, citing the Interlocal Agreement). Plaintiff Millar alleges retaliation not for a discrete act, but

for a pattern of collusion and misconduct including trying to prevent Millar from meeting his legal and professional obligations as an employee, a contractor, a licensed Mechanical Inspector, Plumbing Inspector, Plan Reviewer, Certified Building Inspector and Journey Plumber, Fire Inspector and even putative "code official." *See, e.g., Klaasen v Township of St Clair, unpublished (COA Docket No. 261190) (2006) (copy attached as EXHIBIT C to Millar's 02/25/15 Opposition).* Plaintiff Millar alleges that Defendants have endangered their communities through their violative practices and resulting unsafe conditions. Moreover, Plaintiff Millar alleges that Defendants have demonstrated favoritism among building owners and contractors for motivations that he cannot determine absent reasonable discovery. See, *e.g., Complaint ¶¶ 14-17, 24-25, 35-37.* Millar provided abundant clarifying information as he was able in his filed discovery responses. Millar was struggling to obtain discovery from Defendants with which to flesh out his claims when his Complaint was summarily dismissed.

Again, the Court of Appeals simply disregarded more recent and pertinent cases cited by Millar. For example, as Millar emphasized at the circuit court hearing, the Court of Appeals issued a decision in June 2014 (the month Millar's Complaint was filed) addressing WPA preemption. *03/02/15 Hearing TR, pp 5-6.* In *Landin v Healthsource Saginaw, 305 Mich App 519 (2014),* plaintiff employee sued his former employer for wrongful discharge in violation of public policy. Landin argued that he was terminated for reporting a coworker's negligence. The trial court denied a defense motion for summary disposition and Landin won a jury verdict. The Court of Appeals then affirmed the trial court's conclusion that Michigan law allowed a cause of action for wrongful termination under MCL 333.20176a(1)(a) of the

Public Health Code, which prohibits discharge of an employee who reports malpractice or violation of the Public Health Code by a health professional. *Landin, 305 Mich App 519.*

Citing a decision of this Court, *Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692 (1982),* the Court of Appeals recognized three grounds for finding that termination of an at-will employee violates public policy: (1) explicit legislative actions prohibiting discharge of employees acting in accordance with a statutory right or duty; (2) discharge for employee refusal to violate law; and (3) discharge based on employ exercise of a right by legislative enactment. The court explained that the trial court's reliance on MCL 333.20176a(1)(a) likely fell within the first ground for finding that termination violates public policy based on the WPA and the MCRA. The court also noted that reliance on the statute could fall within the third ground based on the underlying purpose of MCL 333.2017a(1)(a), which was to promote the safety and health of Michigan citizens. The trial court had committed no error in this regard. *Id.*

The Court of Appeals went on to reject defendant's argument that the WPA provided Landin's exclusive remedy. Because the claim was not based on a violation of the Public Health Code, but on alleged malpractice, it did not fall squarely within the WPA. Additionally, the court rejected defendant's claimant that the trial court erred in finding that issues of material fact existed regarding the grounds for Landin's termination. *Id.* Thus, though tricky to apply where, as here, there are many questions about the causes of an adverse employment action, *Landin* clearly warrants further, careful consideration of the facts alleged and the governing law. This Court indicated interest in the issues raised in *Landin*; on April 3, 2015, it granted defendant's application for leave to appeal. However, after considering the

parties' briefs and oral arguments, in a written order dated November 3, 2015, this Court vacated its April 2015 order. This Court stated that it was "no longer persuaded that the questions presented should be reviewed by this Court." *Id, MSC No. 149663, 11/13/15 Order.* As the lower courts' decisions in the instant case are contrary to the prevailing law of *Landin,* this Court's review of the decisions is warranted.

Still another recent ruling by this Court, in *Pace v Edel-Harrelson , *** Mich ***, MSC No. 151374 (February 1, 2016)*, supports Millar's application for this Court's review. In *Pace,* plaintiff employee alleged that she was terminated after informing supervisors that a coworker planned to purchase a stove for personal use with defendant's grant funds. Pace filed suit alleging termination in violation of the WPA and public policy. The circuit court granted summary disposition dismissing both counts. The Court of Appeals reversed the summary dismissal of the WPA count, but affirmed summary disposition of the public policy claim, concluding that Pace presented sufficient evidence to establish a genuine question of fact that she had engaged in "protected activity" under the WPA. *Pace v Edel-Harrelson, 309 Mich App 256 (2015).* Defendant filed an application for leave to appeal to this Court. In lieu of granting leave, and without hearing oral argument, in a unanimous opinion *per curiam*, this Court found that the WPA count failed because a stated intention to commit an act amounting to a violation of a law in the future does not constitute a violation or suspected violation of a law for purposes of MCL 15.362. As the WPA claim provided no recourse to Pace, this Court reversed summary dismissal of her public policy count for further consideration. *Pace v Edel-Harrelson , *** Mich ***, MSC No. 151374 (February 1, 2016).* Clearly, classification of wrongful acts as falling within or without the WPA is a more complex exercise than

Defendants and the lower courts in the instant case performed. This Court's intervention is necessary to bring clarity to these important issues.

Millar notes, again, that in the very short time available to him to file his Complaint, he prepared pleadings that put Defendants on notice of the nature of his claims. See, *e.g., Iron County v Sundberg, Carolson & Assocs, 222 Mich App 120, 124 (1997).* The myriad of possible causes for Defendants' adverse employment decisions could only be outlined, as no one told Millar why they were made. All Millar knew was that his personnel file documented only positive performance reviews, so that was not the problem. See, *e.g.*, *Complaint, ¶21.* Contrary to the Court of Appeals' suggestion, Millar's public policy count was not comprised solely of a paragraph cut and pasted from Count I. *08/04/16 COA Order, p. 7.*[12] In any event, his Complaint was to be construed in a light most favorable to him. *Id.* This Court instructs the courts of this state to be liberal in upholding pleadings without technical restrictions as to form. *Jean v Hall, 364 Mich 434, 437 (1961).* That is, Millar's general allegations and his allegations under each heading were to be considered on the whole in determining whether Millar had or could state any particular cause of action.

Even if this Court were to dismiss Count I of the Complaint, summary dismissal of any claim or allegation of wrongful termination outside the WPA would be entirely premature. Specifically, it has not been established that no factual development could possibly result in a viable public policy claim against a Defendant. Summary disposition is improper where, as here, further discovery might reveal sufficient grounds supporting a cause of action. *Andalzula v Neogen Corp, supra, 292 Mich App 626 (2011).*

[12] See, *e.g., Complaint ¶36.*

C. THE LOWER COURTS ABUSED THEIR DISCRETION BY DENYING MILLAR EVEN A FIRST AMENDMENT TO HIS COMPLAINT.

The lower courts' orders simply disregarded Plaintiff-Applicant Millar's repeated requests for leave to amend, in the event that his Complaint failed. MCR 2.118 commands that amendments be freely granted. This Court has made clear that amendment is not an act of grace, but a right. *Ben P Fyke & Sons v Gunter Co, 390 Mich 649, 656 (1973).* Leave should only be denied for the following particularized reasons: undue delay, bad faith or dilatory motive of the party seeking to amend, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility. *Id.* If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. *Id at pp 656-657.*

No Defendant advanced any argument why Plaintiff-Applicant Millar should not be permitted to amend his Complaint, because none exists. The Registers of Action in the circuit court and the Court of Appeals document multiple extensions of time granted to each Defendant for every sort of filing. No one accuses Millar of bad faith and he has not previously amended his Complaint. No prejudice would have resulted from permitting a amendment, particularly since discovery was ongoing when the trial court granted summary disposition for Defendants. No Defendant countered Millar's Complaint or Affidavit or the facts set forth in his sworn and filed discovery responses.

For all the reasons detailed throughout this Application, Plaintiff Millar's Complaint does state claims on which relief may be granted. The lower courts erred in finding otherwise and they abused their discretion in failing even to address Millar's requests for leave to

amend. Clarity is fundamentally lacking relative to pleading standards for an individual seeking primarily to protect the public trust, health and safety through the courts. The necessity of this Court's review of this matter naturally extends to the clearly erroneous and oppressive failure to permit Millar to file an amended Complaint. See, *e.g., MCR 7.305(B)(2), (3), (5)(a) and 5(b).*

VI. RELIEF SOUGHT

As an initial matter, Plaintiff-Applicant Millar respectfully requests that this Court exercise its jurisdiction to grant this Application and address the lower courts' clearly erroneous findings, which result in material injustice. This Court's guidance is requested in clarifying and resolving the Court of Appeals' significant deviations from established law. Little could be more important in Michigan jurisprudence today than removing patently oppressive obstructions thrown in the path at every turn of licensed state building official/inspector's attempts to discover, investigate, report and rectify conduct that violates the public trust and affects their health and safety. *Id.*

Ideally, this Court will reject the lower courts' nonsensical findings regarding accrual of Millar's WPA count. Permitting employer defendants to rely on unauthenticated, pre-dated writings about employment decisions to defeat valid, timely filings under the WPA leads to absurd results. As literally no facts are disputed by any Defendant, Millar requests that this Court rule as a matter of law that his WPA count began to accrue against all Defendants on March 31, 2014, the date on which they first took the adverse action of transmitting the pre-dated letter to Millar and restricting his work activities. Likewise, Millar requests that this Court rule that his Complaint states a cause of action in Count II which is not preempted by

the WPA. Millar requests that the lower courts' contrary rulings be reversed and the case be remanded to the circuit court for further proceedings. In the unlikely event that this Court finds that Millar's pleadings are insufficient, Millar requests that this Court order the circuit court on remand to permit amendment of any offending provisions in according with MCR 2.118.

Millar also requests that Defendants not be permitted a second bite at the apple on any of the facts they conceded in these proceedings to date. No Defendant proffered evidence contradicting the facts as alleged and, for the purposes of these motions, proved by Millar throughout these lengthy proceedings. For example, because they did not challenge Millar's proof that they are effectively alter egos, each of whom is responsible for the actions of the others, Defendants should not be permitted to argue otherwise in further proceedings. As no challenge was raised, there can be no basis for disturbing the Court of Appeals' findings that Defendants were "one-in-the-same" and Millar asks that they be affirmed by this Court. Millar asks this Court to order on remand to the circuit court that Defendants may not proffer support in any further proceedings that they should or could have, but did not, proffer in connection with the instant motions.

Millar asks that this Court award him costs and attorney fees, as provided in the WPA, as the prevailing party in these matters to date. Millar requests that this Court also provide any other and further relief to him as it deems appropriate under the circumstances.

Respectfully submitted,

DATED: September 15, 2016

REBECCA C. KLIPFEL (P58418)